

IN THE HIGH COURT OF FIJI  
AT SUVA  
COMPANIES JURISDICTION

Companies Action No. 19 of 2020

IN THE MATTER OF PLEASS GLOBAL  
LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT  
3 of 2015

BETWEEN:      CARPENTERS FIJI PTE LIMITED trading as MORRIS HEDSTROM a limited liability  
company having its offices at 34 Rodwell Road, Suva, Fiji.

APPLICANT

AND:            PLEASS GLOBAL LIMITED a company incorporated in Fiji having its office at Places  
Drive, Namosi Road, Namosi, Fiji.

RESPONDENT

BEFORE:            Hon. Mr. Justice Vishwa Datt Sharma

COUNSEL:            Mr. Narayan E.    :    For the Applicant  
                              Mr. Tuitoga T.    :    For the Respondent

DATE OF DECISION:    Monday 09<sup>th</sup> November 2021 @ 9.30am

**DECISION**

*[Application seeking for setting aside of Statutory Demand pursuant to Section 516 of the Companies Act 2015]*

- [1] The Applicant, Carpenters Fiji Pte Limited trading as Morris Hedstrom (CFL) filed an application on 17<sup>th</sup> April 2020 and sought for the following Orders-
- i. That the Statutory Demand dated 18<sup>th</sup> March 2020 and taken out by the Respondent against the Applicant be set aside;
  - ii. That the Respondent to pay the costs of and incidental to this application.
- [2] This application is made pursuant to Section 516 of the Companies Act of 2015 and upon the grounds deposed to in the Affidavit of Kunaseelan Sabaratnam duly sworn and filed herein.
- [3] The Applicant, Carpenters Fiji Pte Limited (CFL) maintains that the debt amount is clearly and genuinely disputed. CFL further submitted that the Demand made by the Respondent is clearly untenable and that it would be abuse of the process and highly irregular to persist with the statutory demand.
- [4] The Respondent, Pleass Global Limited (PGL) opposed the application and filed an opposing Affidavit.
- [5] The Respondent Pleass Global Limited (PGL) took the objection with the Founding Affidavit deposed by Kunaseelan Sabaratnam filed on 17<sup>th</sup> April, 2020 on the basis that the deponent has failed to annex written authority to swear affidavit on the behalf of the Applicant (CFL).
- [6] The First question for determination is - "Whether the omission of the written authority in the Founding Affidavit of Kunaseelan Sabaratnam filed on 17<sup>th</sup> April, 2020 is fatal and cannot be remedied by the filing of the subsequent Affidavit of Kunaseelan Sabaratnam on 20<sup>th</sup> of July, 2020.
- [7] I make reference to the case of *Rajalingam v Rajalingam* [2017] FJHC 111; HPP 35.2013 (13 February 2017), Justice Lyone Seneviratne stated as follows-
- Faber v Nazerian* (2012/42735) [2013] ZAGP JHC 65 (15 April 2013):
- "The general rule which is well established in our law is that in Motion proceedings, the Applicant is required to make his or her case in the founding Affidavit and not in the Reply Affidavit. This Rule is on the principle that the Applicant stands or falls by his or her Founding Affidavit. The Rule is also based on the procedural requirement of the Motion proceedings which requires that the Applicant should set out the cause of action in both the Notice of Motion and the Supporting Affidavit. The Notice of Motion and the Founding Affidavit form part of both the pleading and the evidence. The basic requirement is also that the relief sought has to be found in the evidence supported by the facts set out in the Founding Affidavit."*
- [8] The Applicant's Affidavit in Support filed on 17<sup>th</sup> April 2020 sets out the cause of action in this proceeding. The Application and the Founding Affidavit (Affidavit in Support) forms the Applicant's pleadings and the evidence. The relief sought by the Applicant to set aside the Statutory Demand is found in the evidence supported by facts in the Founding Affidavit (Affidavit in Support).
- [9] However, the Applicant filed his Affidavit in Reply on 20<sup>th</sup> July 2020. At paragraph 7 of this Affidavit, he deposed that he was authorised to swear the Affidavit in Support filed on 17<sup>th</sup> April 2020 and the Affidavit in Reply, and further he is the Director of the Applicant company.

- [10] The Applicant (CFL) appears to **accept this flaw on his omission to annex the written authority when he annexed the purported authority in the Subsequent Affidavit** of Kunaseelan Sabaratnam, filed on 20<sup>th</sup> of July 2020.
- [11] However, in terms of the above quoted case authority *Faber v Nazerian* (2012/42735) [2013] ZAGP JHC 65 (15 April 2013), this case clearly stipulates the general rule that is established in the Law that the Applicant is required to make his/her case in the Founding Affidavit and not in the Replying Affidavit. ***This Rule is on the principle that the Applicant stands or falls by his or her Founding Affidavit.*** The Affidavit in Support deposed by Kunaseelan Sabaratnam in his capacity as the Director of the Applicant company needed to annex a written authority empowering him to swear Affidavits on behalf of the Applicant company, CFL. Once the written authority was annexed to the Founding Affidavit then only the Founding Affidavit of Kunaseelan Sabaratnam would have been procedurally completed to be used and tendered into evidence seeking for the Order for Setting Aside of the Statutory Demand.
- [12] For the aforesaid rational, I hold that the omission of the authority to swear Affidavits on behalf of the Applicant company (CFL) in the Affidavit in Support deposed by Kunaseelan Sabaratnam filed on 17<sup>th</sup> April 2020 is fatal and cannot be accepted into evidence and these proceedings.
- [13] The other objection that was taken by the Respondent, Pleass Global Limited (PGL) is that the Applicant's (CFL) application seeking an Order for Setting Aside of the Statutory Demand is filed out of time and was in non-compliance with section 561 (3) of the Companies Act 2015.
- [14] ***Section 516 of the Companies Act 2015*** provides as follows-
- 516.—(1) A Company may apply to the Court for an order setting aside a Statutory Demand served on the Company.
- (2) An application may only be made within 21 days after the demand is so served.
- (3) An application is made in accordance with this section only if, within those 21 days—
- (a) an affidavit supporting the application is filed with the Court; and
- (b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the Company.
- [15] The onus is on the Applicant (CFL) to satisfy this court that the application for setting aside the statutory demand is made within 21 days of the Demand Notice made pursuant to section 516 (2) of the Companies Act.
- [16] The Applicant (CFL) filed the application coupled with the Supporting Affidavit on 17<sup>th</sup> April 2020 and served it on the Respondent (PGL) on 22<sup>nd</sup> April, 2020. There is no Affidavit of Service, nor any evidence filed to substantiate when the Service of the Applicant's application to Set Aside Statutory Demand was carried out in conformity with section 516 (3) of the Companies Act 2015.
- [17] It is not in dispute that the application by the Applicant (CFL) was made after the expiration of 21 days, one (1) day after, as admitted by the Applicant's Counsels in its submissions.
- [18] Therefore, the application was not made within the required 21 days timeframe as mandated in Section 516 (2) of the Companies Act therein.

[19] The application to Set Aside Statutory Demand was made after the expiration of 21 days and not as mandated in **Section 516 (2) of the Companies Act** therein. The application was in fact filed on 17<sup>th</sup> April 2020. It was served on the Respondent's Lawyers on 22<sup>nd</sup> April 2020, as admitted in the Applicant's (CFL's) written submissions.

[20] It is also not disputed that the said application was served on the Respondent after some delay on 22<sup>nd</sup> April 2020 in breach of **Section 516 (3) (b) of the Companies Act**.

[21] There is no evidence otherwise tendered to the Court by the Applicant (CFL) that the application was filed and served within the mandated timeframe of 21 days as per **Section 516 (2) of the Companies Act**.

[22] **Section 516 (3)** is explicit when it states that:

*"(3) An application is made in accordance with this Section only if, within those 21 days -*

*(a) An Affidavit Supporting the application is filed with the Court; and*

*(b) A copy of the application, and a copy of the Supporting Affidavit, are served on the person who served the Demand on the Company."*

[23] I make reference to the case of *Sky Glory Pte Limited v Ben* [2020] FJCA 168; ABU 18 of 2020 (08 September 2020), Justice Guneratne J.A said-

*"The words "only if" and "and" in the said Section made it mandatory that the application had not only to be filed but also to be served within 21 days.*

*The intention of the Legislature being clear in using the words "only if" which are words synonymous with "must" or "shall" and the use of word "and" used in conjunction in "3 (b)" with "3 (a)", there was no room for any argument "substantial compliance".*

*The Section contemplates "strict compliance"."*

### CONCLUSION

[24] The High Court lays down procedure in general to Civil matters. **The Companies Act mandates a special procedure.**

[25] The Honourable **Chief Justice's Practice Direction of 03<sup>rd</sup> of April 2020** does not mention and include the **substantive Companies Act 2015** in computation of timelines in filing of documents.

The Applicant's (CFL) argument that he adhered to the Practice Direction of 03<sup>rd</sup> of April 2020 in order to file his application for Setting Aside the Statutory Demand was incorrectly interpreted and/or understood by him in computation of timeline in filing applications and documents.

[26] It appears when the Applicant (CFL) made this application for Setting Aside of the Statutory Demand pursuant to **Section 516 of the Companies Act 2015**, it then realised that the application was served on the Respondent out of the timeframe of 21 days prescribed by the said Section, expected the Court to totally disregard the very provision of the law pursuant to which it

brought this application to the Court and relied on the Chief Justice's Practice Direction of 03<sup>rd</sup> April 2021 accordingly.

[27] Whenever a legislation prescribes a time period to procedurally carry out a particular step to be taken, it rather is compulsory and therefore the Court has no alternative but to apply such provision strictly without exercise of any discretion.

In fact, upon the perusal of the Companies Act 2015, **there is no provision to be found in Section 516 or in any other Section of the Companies Act 2015 which confers a discretion upon the Court to either extend or enlarge the period of time within which an application to Set Aside a Statutory Demand should be made.**

[28] Since the application proceeded to full hearing with Affidavits and written submissions filed, it is only appropriate that a summarily assessed cost of \$650 is awarded to the **Respondent Pleass Global Limited (PGL).**

[29] For the aforesaid rationale, the Court proceeds to make the following Orders-

#### ORDERS

- i. The omission of the written authority in the Founding Affidavit of Kunaseelan Sabaratnam filed on 17<sup>th</sup> April 2020 is fatal and it cannot be remedied by a subsequent Affidavit filed on 20<sup>th</sup> July 2020.
- ii. The application seeking for the Setting Aside of the Statutory Demand served on the Applicant (CFL) is out of time in terms of Section 516 (3) of the Companies Act 2015 and is accordingly dismissed.
- iii. There will be an Order for summarily assessed costs of \$650 against the Applicant Carpenters Fiji Pte Limited (CFL).

Dated at Suva this 09<sup>th</sup> day of November, 2021



Vishwa Datt Sharma  
Judge

cc: Patel Sharma Lawyers, Suva  
Haniff Tuitoga, Suva